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No. 03-509

In the Supreme Court of the United States

ENVIRONMENTAL PROTECTION AGENCY, ET AL.,
PETITIONERS

v.

SIERRA CLUB, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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This Court ruled in *Buckhannon Board & Care Home, Inc.* v. *West Virginia Department of Health & Human Resources*, 532 U.S. 598, 610 (2001), that a litigant cannot obtain attorney's fees under "prevailing party" fee-shifting statutes on the theory that the litigant's lawsuit was the "catalyst" for a government agency's change in position. This case poses the question whether a litigant may nevertheless invoke the catalyst theory to obtain attorneys' fees from a government agency under federal statutes that authorize the award of attorney's fees when "appropriate." See, *e.g.*, Clean Air Act (CAA) § 307(f), 42

U.S.C. 7607(f). That question, which arises under more than a dozen federal statutes, see *Ruckelshaus* v. *Sierra Club*, 463 U.S. 680, 682 n.1 (1983), presents the most important attorney's fee issue currently before the federal courts. Respondents present four arguments why the Court should not decide the question. None of those arguments is persuasive. To the contrary, those arguments highlight why this Court should decide the issue now.

A. The Court Of Appeals Erroneously Ruled That This Court's Decisions Authorize The Award Of Attorney's Fees To Parties Who Have Not Prevailed On The Merits Of Their Claims

Respondents argue that the court of appeals properly awarded attorney's fees despite the absence of court-ordered relief because this Court's decision in *Ruckelshaus* requires that result (Br. in Opp. 4-6) and because this Court's rejection of the catalyst theory in *Buckhannon* is inapposite (*id.* at 6-7). As explained in the government's petition (at 11-19), the court of appeals' decision is incorrect. Respondents' specific contentions in support of the court's decision are mistaken.

As the government has already explained (Pet. 11-19), the court of appeals erroneously construed Section 307(f) to authorize catalyst-based fee awards by relying on obiter dicta in this Court's *Ruckelshaus* decision. Respondents compound that error by characterizing that dicta as the Court's holding. They inaccurately claim:

> *Ruckelshaus* held that Congress used the "whenever appropriate" language in § 307(f) specifically to extend fee awards "to suits that forced defendants to abandon illegal conduct, *although without a formal court order*." 463 U.S. at 686 n.8.

Br. in Opp. 4 (emphasis added by respondents). The Court stated its actual holding as follows:

> We conclude, therefore, that the language and legislative history of § 307(f) do not support respondents' argument that the section was intended as a radical departure from established principles requiring that a fee claimant attain some success on the merits before it may receive an award of fees. Instead, we are persuaded that if Congress intended such a novel result—which would require federal courts to make sensitive, difficult, and ultimately highly subjective determinations—it would have said so in far plainer language than that employed here. *Hence, we hold that, absent some degree of success on the merits by the claimant, it is not "appropriate" for a federal court to award attorney's fees under § 307(f).*

Ruckelshaus, 463 U.S. at 693-694 (emphasis added). The passages from footnote eight that respondents cite as holding, as well as similar passages they cite elsewhere (Br. in Opp. 5-6), are simply dicta, unnecessary to the Court's ultimate ruling, that address the *Ruckelshaus* plaintiffs' characterization of the Clean Air Act's legislative history. See 463 U.S. at 686-691.[1]

Ruckelshaus did not involve a catalyst-based fee award, and the Court's holding did not depend on the passages that respondents cite. As the Court unambiguously stated:

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[1] See, *e.g.*, *Ruckelshaus*, 463 U.S. at 687-688 (discussing "the meaning of [House Report No. 294]"); *id.* at 689-690 (discussing a "House Report's statement").

> We conclude that *the language of the section*, read in the light of the historic principles of fee-shifting in this and other countries, requires the conclusion that *some success on the merits* be obtained before a party becomes eligible for a fee award under § 307(f).

463 U.S. at 682 (emphasis added). The Court discussed Section 307(f)'s legislative history because the *Ruckelshaus* plaintiffs "devot[ed] their principal attention" to that subject. *Id.* at 686. The Court, however, did not need to address it because "[a] statute's legislative history cannot supply a waiver that does not appear clearly in any statutory text." *E.g.*, *Lane* v. *Pena*, 518 U.S. 187, 192 (1996). Respondents are accordingly wrong in contending that the passages they cite are anything more than nondispositive dicta. Br. in Opp. 4. See *Rivet* v. *Regions Bank*, 522 U.S. 470, 477-478 (1998).[2]

Respondents' contention that *Buckhannnon* is irrelevant is also mistaken. The Court's decision in *Ruckelshaus* plainly requires that a party seeking fees under a "when appropriate" fee-shifting statute must at least partially "prevail," in the sense that the party achieves "some degree of success on the merits," in order to receive a fee award. See 463 U.S. at 682, 686, 688, 694. *Buckhannon* squarely addresses what it

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[2] Respondents contend (Br. in Opp. 6, 9-10) that the government's brief in *Ruckelshaus* contains statements that can be read to support application of the catalyst theory under "when appropriate" fee-shifting statutes. The government's statements in a 20-year-old brief that predated this Court's decision in *Buckhannon* are not, however, dispositive on an issue that this Court did not reach.

means to "prevail." A "prevailing party" is "one who has been awarded some relief by the court." 532 U.S. at 603. A party does not "prevail," in the legal sense, if the party has "failed to secure a judgment on the merits or a court-ordered consent decree." *Id.* at 600.

The Court's decision in *Buckhannon* is, accordingly, highly relevant. It establishes that, to satisfy *Ruckelshaus*'s requirement of "some degree of success on the merits," 463 U.S. at 694, the party must secure, at the least, some measure of *judicial* relief. The Court in *Ruckelshaus* plainly used the term "partially prevailing party" in that sense. See *id.* at 686 (Section 307(f) "does not completely reject the traditional rule that a fee claimant must 'prevail' before it may recover attorney's fees"). See Pet. 14-15.

Respondents' mistaken arguments in defense of the court of appeals' decision are instructive because they highlight that the dispute whether "when appropriate" fee statutes allow catalyst-based fee awards depends on the proper reconciliation of this Court's holdings in *Buckhannon* and *Ruckelshaus*. As the court of appeals acknowledged, that task falls squarely within this Court's province. See Pet. App. 15a. Because only this Court can answer that question authoritatively, the Court should resolve that issue in this case, which squarely presents the question in a straightforward and cleanly presented context.

B. This Court Should Resolve The Issue Even In The Absence Of A Conflict Among the Courts Of Appeals

Respondents argue (Br. in Opp. 7-8) that this Court's review is unnecessary because the court of appeals' decision does not conflict with any decision of another court of appeals. The government, however, has not relied on any such conflict. Rather, the government

submits that this Court's review is needed because, as described above, the court of appeals' decision conflicts with this Court's clear teachings in *Buckhannon* and *Ruckelshaus* and presents an important issue that warrants resolution at this time. See Pet. 19-23.

The need for this Court's review is particularly clear because the court of appeals' decision conflicts with the approach that this Court has prescribed for construing fee-shifting statutes. The court of appeals rejected "EPA's invitation to apply standard tools of statutory construction, including *Ruckelshaus*'s presumptions against inferring departures from the American Rule and waivers of sovereign immunity." Pet. App. 10a-11a. It made no effort to determine whether Section 307(f) of the Clean Air Act provides "explicit statutory authority" for awarding fees based on the catalyst theory. *Buckhannon*, 532 U.S. at 602-603. And it did not treat Section 307(f) as a partial waiver of sovereign immunity that "must be 'construed strictly in favor of the sovereign,' . . . and not 'enlarge[d] beyond what the language requires.'" *Ruckelshaus*, 463 U.S. at 685 (citations omitted). The court of appeals expressly dispensed with those required inquiries on account of its misplaced reliance on obiter dictum. Pet. App. 10a-11a.

Here, as in *Ruckelshaus* itself, the issue is sufficiently important to warrant this Court's resolution without awaiting for a conflict to develop among the courts of appeals. Indeed, respondents' rote focus on the absence of a square conflict among the courts of appeals highlights the absence of good reason to await the development of such a conflict. As the court of appeals itself recognized, the question whether Section 307(f) authorizes catalyst-based awards turns on the proper reconciliation of this Court's decisions in *Buck-*

hannon and *Ruckelshaus*. Pet. App. 5a-6a. Further litigation in the courts of appeals is unlikely to provide additional insight on that purely legal question, which turns on what significance the Court itself gives to footnote eight of the *Ruckelshaus* decision. As the court of appeals stated, reconciling *Buckhannon* and *Ruckelshaus* "is a matter for the Supreme Court, not us." *Id.* at 15a.

C. Principles Of Stare Decisis Support Review Of This Case

Respondents contend that "principles of stare decisis strongly militate against granting certiorari." Br. in Opp. 9 (capitalization altered). The exact *opposite* is true. This Court's decision in *Buckhannon* emphasizes the danger of lower courts neglecting the Court's "prior *holdings*," 532 U.S. at 605, in favor of "*misleading dicta*," *id.* at 621 (Scalia, J., concurring). The lower court's rejection of that guidance could hardly be more apparent. As noted above, the court of appeals expressly declined "to apply standard tools of statutory construction, including *Ruckelshaus*'s presumptions against inferring departures from the American Rule and waivers of sovereign immunity," Pet. App. 10a, 11a, in favor of what the court itself acknowledged was "dicta," *id.* at 11a. Unless this Court acts, the court of appeals' decision may well create the same situation that arose in *Buckhannon*, where non-authoritative dicta "nurtured and preserved" a "near-unanimous," but mistaken, interpretation of federal law. See 532 U.S. at 621-622 (Scalia, J., concurring).

D. This Case Presents An Important Issue Warranting This Court's Review

Respondents contend that this case does not raise any "matters of pressing or substantial concern war-

ranting this Court's attention." Br. in Opp. 11. They simply ignore the obvious significance of this case. The court of appeals' decision is likely to control the application of at least a dozen federal "when appropriate" fee-shifting statutes within the District of Columbia Circuit, where those claims frequently arise. See Pet. 20-21. At the same time that the government pays out unauthorized fees in that circuit, it must continue to litigate whether catalyst-based awards are available in other circuits. That litigation will burden the courts with time-consuming and wasteful inquiries, and it will sustain an existing conflict among the courts of appeals over the specific standard for determining when fees are available under the catalyst theory. See Pet. 21-22. This Court has a strong interest in sparing the lower courts the burdens of unnecessary attorney's fees litigation and preventing unauthorized charges against the public fisc. That interest is at its zenith here where the issue ultimately depends on an authoritative reconciliation of the Court's own decisions.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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DECEMBER 2003